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IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

RONALD DeRAY SKIPPER,

Petitioner,

V.

STATE OF SOUTH CAROLINA,

Respondent.

On Writ of Certiorari to the
Supreme Court of South Carolina

BRIEF OF AMICI CURIAE, THE STATE OF ALABAMA, THE STATE OF ARKANSAS, THE STATE OF CONNECTICUT, THE STATE OF FLORIDA, THE STATE OF IDAHO, THE STATE OF MISSOURI, THE COMMONWEALTH OF PENNSYLVANIA, THE COMMONWEALTH OF VIRGINIA, THE STATE OF WASHINGTON, AND THE STATE OF WYOMING*

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BRIEF OF AMICI CURIAE

INTEREST OF AMICI CURIAE

Amici curiae are states with differing evidentiary standards for sentencing hearings. Although amici curiae do not all have rules identical to the evidence principles followed by South Carolina in the present case, all recognize the need for readily enforceable rules that enable trial judges to ensure that evidence received at sentencing hearings is relevant and reliable. In a federal system, the precise contours of these rules should be allowed to vary from state to state so long as they comport with principles of fundamental fairness.

STATEMENT OF THE CASE

Amici curiae adopt the statement of the case made by Respondent, the State of South Carolina.

SUMMARY OF ARGUMENT

Amici will not duplicate the detailed analysis of case law that it is expected that South Carolina will provide. Instead, this brief concentrates upon issues of policy.

I.

Even though the sentencing hearing should admit all relevant evidence, trial judges must have room for discretion to exclude marginal evidence, or trials may be lengthened indefinitely or collateralized so that issues of importance are lost. Defendants have offered evidence in sentencing hearings ranging from photographs of execution equipment to statistical testimony challenging the legislature's enactment of capital punishment. While some states might admit the evidence in the case at bar, that holding probably reflects a judgment that exclusion is difficult to enforce rather than a judgment that this extremely marginal evidence has substantial relevance. Rulings on relevance issues will normally differ from jurisdiction to jurisdiction. and most codifications of evidence rules provide the judge with considerable discretion. Fed. R. Evid. 403, for example, allows the trial judge to balance relevance against such factors as delay, confusion, time consumption, cumulative evidence, and prejudice. In a federal system, South Carolina's approach should not be prohibited by the Constitution.

II.

The principle admitting relevant information at the sentencing hearing should not remove traditional rules governing the form and reliability of evidence. If extended to its extreme, such a principle might nullify the hearsay rule and cause the admittance of a wide variety of evidence that traditionally has been excluded on reliability grounds. For example, the federal rules require personal knowledge and exclude lay witness opinions that the trial judge in his discretion finds not rationally based on perception or helpful to the trier of fact. Lay witness speculation about other persons' states of mind or possible future behavior, of the kind at issue in this case, is precisely the sort of evidence that has been excluded under these principles.

ARGUMENT AND AUTHORITIES

I. IN A FEDERAL SYSTEM, STATES SHOULD HAVE REASONABLE ROOM FOR DIFFERING RULES GOVERNING THE IDENTIFICATION AND EXCLUSION OF EVIDENCE THAT IS UNRELATED TO THE ISSUES.

Although the admissibility of evidence at the sentencing hearing is broad, and this Court has stated that all "relevant" [1] information should be allowed, logically there must be limits; otherwise, the sentencing hearing could be lengthened indefinitely and collateralized so that issues of importance were lost. Furthermore, the adversary system may induce lawyers to divert the jury from its duty. For example, in actual cases, different defense attorneys have offered evidence consisting of photographs of the electric chair; [2] presentation of the defendant's entire family, standing in a row, for jury view; [3] testimony of other persons sentenced to death in other cases but granted new trials (offered for the purpose of causing jurors to ignore issues in the case on trial and to reach the desired result simply because another case has resulted in an apparently inadequate penalty); [4]

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1 *Jurek v. Texas*, 96 S.Ct. 2950, 2958 (1976); *see also Gregg v. Georgia*, 428 U.S. 153, 206 (1976); *cf. Lockett v. Ohio*, 438 U.S. 586, 601, 604 (1978).

2 This evidence was offered, for example, in *State v. Sierra*, No. 214983 (209th Dist. Ct. Harris County, Texas, July 7, 1976). Interview with L. H. Stewart, Assistant District Attorney, in Houston, Texas (Oct. 26, 1976).

3 This evidence was offered, for example, in *State v. Brock*, No. 213720 (178th Dist. Ct. Harris County, Texas, Oct. 25, 1976). *See* D. CRUMP & G. JACOBS, CAPITAL MURDER 74 (1977).

4 This evidence was offered, for example, in *State v. Sierra*, No. 214983 (209th Dist. Ct. Harris County, Texas, July 7, 1976). Interview with L. H. Stewart, Assistant District Attorney, in Houston, Texas (Oct. 26, 1976); *see* D. CRUMP & G. JACOBS, *supra* note 3, at 246. The evidence was excluded as irrelevant.

and testimony by statisticians or sociologists purporting to show that capital punishment does not deter or is otherwise unsuited to legislative goals. [5] In one case an appellate court actually wrote an opinion holding that a photograph, depicting the defendant when he was in the first grade, could be properly excluded. *Berard v. State*, ____ So.2d ____, No. 3-Div.-585 (Ala. Crim. App. July 31, 1984). The defendant had there assigned, as error, the trial court's ruling "in not allowing appellant's . . . photographs while growing up." *Id.*, slip op. at 14-15.

If capital trials are to be rational, the States must have authority to exclude marginal or irrelevant evidence in these and other categories. In a federal system, it is virtually certain that all States will not have identical views regarding evidence that is relevant to the issues, although they generally may have similar views regarding evidence with significant relationship to the issues. Even with respect to the most fundamental rights, this Court has said that constitutional rules must be read with "much leeway in application" by individual states. *Taylor v. Louisiana*, 419 U.S. 522, 538 (1975). In the capital punishment context, this Court has attempted to move away from "ritualistic adherence" to overly precise requirements. *Wainwright v. Witt*, 105 S.Ct. 844, 850, 852 (1985). And in another capital sentencing case, *Lockett v. Ohio*, 438 U.S. 586, 604 n.12 (1978) (emphasis added), the Court's plurality said: "Nothing in this opinion limits *the traditional authority of a court to exclude, as irrelevant,* evidence not bearing on the defendant's character, prior record, or the circumstances of his offense."

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5 This evidence was offered, for example, in *State v. Sierra*, described in *supra* note 4. *See* authorities therein cited. Defendant there offered *both* expert and lay testimony to the jury on these statistical issues.

The trial court's ruling in *Sierra*, excluding this evidence as not relevant, was correct. The question whether adoption of a capital punishment statute is justified by deterrence, prevention or retributive considerations is a legislative one. To put that issue to individual jurors would be to create inconsistent results. The same inconsistency would follow from the general admittance of other kinds of irrelevant, unreliable evidence.

Unless state courts are given reasonable "leeway" to evolve rules of evidence that are reasonable, fair, and even-handed, trial judges, as a practical matter, will be forced to allow evidence that is of the most marginal relevance and that collateralizes the inquiry so as to divert the jury from the issues. Indeed, a creative defense attorney might well consider it his duty to test the trial court's rulings by offering diversionary evidence, pushing the limits of admissibility, in order either to detract attention from relevant evidence or to force the court into error. A request that the jury be transported to and allowed to view a place of employment because the defendant once planned to work there, or an offer of detailed testimony about an indiscretion by the victim a score of years ago when he was in grade school, are obvious examples of evidence that clearly should not be admitted, but that it is impossible to be certain every court would regard as devoid of *any* relevance to a material issue. [6] Indeed, it is possible to argue that such evidence would be more highly relevant than the testimony at issue in the present case, given its speculative and unreliable nature.

Shortly after this Court's decision in *Gregg v. Georgia*, 96 S.Ct. 2909 (1976), it was pointed out that "the tendency of lawyers to offer [inadmissible evidence regarding sentencing alternatives] may be expected to expand." Crump, *Capital Murder: The Issues in Texas*, 14 HOUS. L. REV. 531, 576 (1977).

> "Examples from actual practice include arguments to the jury that the death penalty makes jurors no better than the members of a firing squad; that in the celebrated *Leopold-Loeb* case the defendants were rehabilitated because they were not sentenced to death; and that capital punishment is unfair because police officers who peddle narcotics are not put to death even though more blameworthy than the defendant on trial."

Id. at 577.

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6 See *infra* note 8 and accompanying text.

Many States might regard the evidence in the present case as admissible; the decision to admit it, however, probably reflects a judgment that it is more problematic to enforce exclusion, rather than an evaluation of the evidence as having any great relevance.[7] Other States, such as South Carolina, may exclude this marginal evidence. In a federal system, that result should not be precluded under the Constitution.

While it is true that the scope of admissible evidence in the sentencing phase of a capital case is necessarily broad because of the scope of the issues presented, it should not become boundless. Rationality and principled decisionmaking have been considered essential to the constitutional imposition of the penalty of death. *Furman v. Georgia*, 408 U.S. 238 (1972); *Gregg v. Georgia*, 428 U.S. 153 (1976). That goal cannot be advanced when the inquiry that may lead to a sentence of death is influenced by speculative, unreliable or collateral evidence, as it would be if admissibility were limited only by the imagination of counsel.

II. THE DUE PROCESS CLAUSE SHOULD NOT PREVENT STATES FROM SETTING REASONABLE STANDARDS FOR THE RELIABILITY OF EVIDENCE AND THE FORM IN WHICH IT IS ADMITTED, OR FROM EXCLUDING EVIDENCE THAT IS UNDULY SPECULATIVE AND CONJECTURAL.

If the requirement for admittance of "all relevant evidence" were taken overly literally, it would invalidate traditional evidence rules on a wholesale basis. For example, it would dispense with the hearsay rule. Much hearsay is obviously relevant;[8] it is

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7 *See infra* notes 10-11 and accompanying text (reliability of lay opinion evidence regarding future human behavior).

8 Relevant evidence means evidence having "any tendency" to make a fact that is of consequence to the determination of the action more or less probable. Fed. R. Evid. 402. This definition could

excluded, however, in every State and federal jursidiction, because it is generally unnecessary and untrustworthy.[8a] In this manner, the law encourages the presentation of evidence in reliable forms that can be tested by cross examination. Similarly, the law excludes unauthenticated objects, documents that are not identified, opinions requiring expertise offered by non-experts, offers of compromise, subsequent remedial measures, the existence of liability insurance, and many other kinds of evidence.[9] These items are excluded in virtually every American jurisdiction, even though they have demonstrable relevance.[9a]

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allow evidence that is either unreliable or collateral to the issues. Rule 403 therefore empowers the court to exercise discretion in excluding marginal evidence.

8a If the evidence qualifies under an exception to the hearsay rule (or if it is unusually trustworthy and necessary), its exclusion can sometimes be so prejudicial as to deny due process. *See, e.g., Green v. Georgia*, 442 U.S. 95 (1979) (exclusion of highly reliable and relevant declaration against penal interest by codefendant, offered in mitigation, held error). This Court's reasoning in *Green* was simply that the hearsay rule "may not be applied mechanistically to defeat the ends of justice." *Id.* at 97, *quoting Chambers v. Mississippi*, 410 U.S. 284, 302 (1973). This principle applies to both capital and non-capital trials, as *Chambers* indicates.

Green, by implication, supports the principle that hearsay not falling within an exception, and not possessing particular indicia of reliability, *can* be excluded.

9 *See generally* C. McCORMICK, EVIDENCE (1984).

9a Opinions of polygraph operators, "truth serum" results, and opinions of other purported experts on veracity are excluded in most jurisdictions. Yet the States have been faced with demands that they must freely admit these opinions in capital cases as a consequence of the "all relevant evidence" standard. *Cf. Cooper v. State*, 336 So.2d 1133, *modified*, 437 So.2d 1070 (Fla. 1983). Surely the "all relevant evidence" standard does not mean that the states must admit any and every opinion of this kind, either for or against the defendant, regardless of its lack of reliability.

A rule excluding lay witness opinions that depart substantially from a basis of factual observation is well established. [10] The Federal Rules of Evidence, for example, exclude lay opinions unless they are (1) "rationally based on . . . perception" and (2) "helpful" to the trier of fact, and the Rules provide the trial judge considerable discretion to regard evidence as inadmissible on these grounds. Fed. R. Evid. 701.[10a] While the Rules ordinarily allow admittance of lay opinions in the nature of estimates, shorthand renditions of facts, descriptions of business routine, and like matters, evidence involving speculation about future possibilities is frequently excluded.[11] It is in precisely that category that the evidence at issue in the present case falls.

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10 *Cf.* C. McCORMICK, EVIDENCE 23-29 (1984). *See also* authorities cited *infra* note 11.

10a "Whether an inference is helpful or not is very much in the discretion of the court." C. McCORMICK, EVIDENCE 28 n.19 (1984). *See also* authorities cited *infra* note 11.

11 Wigmore states that "Knowledge must involve rational inferences from adequate data . . . . Thus it is that the law may reject testimony which appears to be founded" on "scanty" data. 2 J. WIGMORE, EVIDENCE sec. 659 (Chadbourne ed. 1979).

"Opinions as to the state of mind or emotion of another create special difficulties." M. GRAHAM, WEST'S HANDBOOK OF FEDERAL EVIDENCE 610 (1981). "The state of mind or emotion of another person is not, in the nature of things, susceptible of firsthand knowledge. Hence testimony directly on the state in question has been excluded." *Id.*; *see also United States v. Phillips*, 600 F.2d 535 (5th Cir. 1979) (testimony about another person's mental state said to amount to little more than witnesses "choosing up sides"); *United States v. Jackson*, 569 F.2d 1003 (7th Cir. 1978) (lay witness speculation about possible causes of another person's depression held properly excluded); *United States v. Popejoy*, 578 F.2d 1346 (10th Cir. 1978) (impression that someone knew of robbery held correctly excluded as improper attempt to interpret mind of another). *But cf. John Hancock Mut. Life Ins. Co. v. Dutton*, 585 F.2d 1289 (5th Cir. 1978).

In the case at bar, the evidence does not involve the *present* state of mind of another. Instead, it is more speculative; it is an effort to divine the *future* state of mind of another person and to predict his future behavior on that basis. This kind of lay witness

One may be better able to visualize the reason for exclusion of this evidence by imagining evidence offered by the prosecution that would be the counterpart of the evidence in question here. The prosecution might, for example, call a witness associated with the victim. If that witness were to offer his opinion that the defendant would adjust poorly to prison conditions and would commit acts of violence at every available opportunity, there might be States that would admit the evidence, but there would be others that would, reasonably, exclude it. [12] There is substantial ground for difference of

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opinion should be more readily subject to exclusion than the opinions discussed by Wigmore and Graham.

See also 3 J. WEINSTEIN & M. BERGER, EVIDENCE sec. 701(02) (1985) ("Rule 701 seeks to balance the need for relevant evidence against the danger of admitting unreliable testimony"); 3 D. LOUISELL & C. MUELLER, FEDERAL EVIDENCE 43, 618-627 (1979) (recognizing "an understandable reluctance of courts to allow the 'opinions' of lay witnesses where these seem to be mere speculation or guesswork, or amount to high flown conclusions based upon sparse data . . . .").

The issue is not whether the South Carolina trial judge's ruling in this case was or was not precisely the same application of these principles that another court might make. The important point, instead, is that South Carolina's holding is based upon a traditional and appropriate concern for the reliability of evidence, in which judges have always had necessary room for discretion. *See* note 10a *supra*. In a federal system, the Constitution should not prohibit this approach.

12 Petitioner Skipper's argument logically must be that this prosecution evidence is admissible, just as he argues that his evidence is admissible. First, the testimony of the contemplated witnesses is not given by an offer of proof. It remains possible that the effect of their testimony would be to reinforce the prosecution's view of the case, either on direct or on cross. In fact, cross examination, which entails leading questions, would be particularly likely to demonstrate that these witnesses' speculations could support inferences of violent behavior in the future. Furthermore, the prosecution presumably could call rebuttal witnesses whose opinions would differ from Petitioner's claims and who would speculate that Petitioner Skipper would frequently be violent in the future. For example, the prosecution might wish to call personnel from the Horry County jail, where Skipper was violent after the arrest in this case, to provide rebuttal opinions to the effect that Skipper would likely make a

opinion about the reliability of lay predictions of future human behavior. A State's decision to exclude such evidence should not be invalidated by the Constitution.[13]

CONCLUSION

In a federal system, States should not be considered in violation of the due process clause if they evolve varying principles for determining what evidence is relevant to the issues, so long as those rules are not fundamentally unfair. Likewise, the due process clause should not prevent the States from setting reasonable standards for the form and reliability of evidence offered at a capital trial in the sentencing hearing.

Respectfully submitted,

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poor adjustment. However, South Carolina should be able to confine testimony to disputes that are more relevant and reliable than these speculations.

13 This case illustrates "the importance of allowing the States to experiment and innovate, especially in the area of criminal justice." *Delaware v. Fensterer*, 54 U.S.L.W. 3301, 3302 & n.1 (U.S.S.Ct. Nov. 4, 1985) (per curiam) (Mr. Justice Stevens, concurring). "[N]either the constitution as originally drafted, nor any amendment, nor indeed any need, dictates that we have absolute uniformity in the criminal law in all the States." *Id., quoting California v. Green*, 399 U.S. 149, 171 (1970) (separate opinion of the Chief Justice).